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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1598

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,

Petitioner,

—v.—

ARNHEIM AND NEELY, INC., ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE REALTY ADVISORY BOARD ON LABOR RELATIONS, INC., *AMICUS CURIAE*

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BRIEF OF THE REALTY ADVISORY BOARD ON LABOR RELATIONS, INC., *AMICUS CURIAE*

Statement of Interest

The Realty Advisory Board on Labor Relations, Inc.* (hereafter "RAB") is a membership corporation whose members are owners and managing agents of apartment and commercial buildings in New York City. Its members employ in excess of 20,000 building service employees, and, as representative of its members, the corporation negotiates collective bargaining agreements on their behalf with numerous building service local unions.

* This brief *amicus curiae* is filed pursuant to the consent of all parties to the case. The consents are filed with the Court together with this brief.

Summary of Argument

The principal issue in these proceedings is whether the business of the building owner or that of his managing agent is measured for qualification under the Fair Labor Standards Act's minimum dollar requirement in order to determine whether certain building service workers are "employed in an enterprise engaged in commerce" and so covered by the Act.*

The Third Circuit Court of Appeals held that these workers were "employed" by the owners and, therefore, that it is each owner's business, and not that of the managing agent, that is measured to determine whether the Act applies.

The decision reached by the Third Circuit was compelled by the FLSA's terms and purposes. For an "enterprise" to qualify as being "engaged in commerce" and so be covered by the Act, it must be large enough to do currently at least two hundred and fifty thousand dollars of business each year. The purpose of this minimum dollar requirement, as the legislative history makes clear, is to exclude small businesses in order to protect them from the resultant dislocative effects of the Act's application. This objective can be accomplished only if the measuring entity is that business which ultimately bears the labor costs. Here, the workers are paid out of the owner's funds and the owner alone enjoys the profits and suffers the losses from the building's operation. If the measuring entity used is the business of the managing agent who

* The Fair Labor Standards Act of 1938 as amended, 29 U.S.C. §§201 *et seq.*, is referred to as the "Fair Labor Standards Act," the "FLSA," or the "Act."

receives a set fee and has no equity in the building's operation, application of the minimum dollar requirement would be a sham. It is the building owner, who stands to suffer the dislocation which the Act's minimum dollar requirement seeks to avoid, whose business must be measured for compliance with that requirement.

The importance of interpreting the minimum monetary requirements so as to carry out the Act's purpose to protect small businesses is demonstrated by the facts of the instant case. A decision that the Act applies to these workers would significantly increase the operating costs and likely drive from business many small entrepreneurs in an industry in which supply already lags alarmingly behind the demand. New York City, for example, is plagued by a major shortage of adequate low and middle income housing. Yet, owners of many such units presently in existence are operating enterprises so marginal that any increased labor cost resulting from the FLSA's application could force them out of business. It was Congress' precise intent in excluding such small businesses to protect them, and this Court must not endorse Petitioner's attempt to circumvent fulfillment of that purpose.

Facts

Arnheim and Neely, Inc. (the "Company") is a real estate management company which manages eight office buildings and one apartment complex in the Pittsburgh metropolitan area. Each of these buildings is unrelated and separately owned, and each of the nine owners has independently contracted with the Company for the latter's services. These contracts provide generally that the Company is to operate and maintain the buildings on a day-to-day basis, subject

to the overall direction and approval of the owner.* The owner in turn agrees to pay the Company a set monthly fee. (A. 20-27; 38-44).**

Each building's rent payments and other receipts are collected by the Company and deposited in a separate account for that owner. (A. 21, 24). The Company, as agent for the owner, pays the building's expenses including the payroll and its own fee out of that account. (A. 22). The balance, if any, is returned to the owner and any deficit in the account must be made up by the owner. (A. 22). In sum, any profit or loss from a building's operation is solely the owner's. (A. 23). The Company has no equity in the building and receives the identical fee regardless of profit or loss. (A. 22, 23).

Workers have been hired at each building to provide necessary services. These include elevator operators, custodial workers, building superintendents, watchmen, and other maintenance personnel (hereafter "workers"). (A. 28-37). As noted above, they are paid by the Company as agent for the owner, out of the owner's funds. (A. 21-22).

The Secretary of Labor (hereafter "Petitioner") commenced this action under Fair Labor Standards Act §17 to enjoin the Company, as "employer" of these workers, from violating the FLSA's minimum wage, overtime, and record-keeping provisions and require payment of wages

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* These contracts are similar to the types of contracts that exist between managing agents and owners in the City of New York and elsewhere throughout the nation.

** References to the Appendix to the pleadings in the Third Circuit Court of Appeals are identified by "A." followed by the appropriate page number(s). References to the Brief filed by Petitioner in this Court are identified as "Pet. Br." All statutory citations herein, unless otherwise identified, are to the Fair Labor Standards Act.

allegedly owed the workers. The Company denied that it had violated the Act, claiming that the workers were not in its employ but rather were employees of the owners. The District Court for the Western District of Pennsylvania found that the workers were employed by the Company and that the Company had been covered by the Act since February 1967. 324 F. Supp. 987, 997. The Company appealed this decision to the Third Circuit Court of Appeals.

The Third Circuit reversed. 444 F.2d 609. The Court concluded that Petitioner had failed to prove the FLSA's application to these workers, finding that they were in the employ of the building owners and that none of the owner's businesses had been shown to have done in any year the minimum dollar amount of business necessary to qualify for coverage under the Act. 444 F.2d at 613-14. The Third Circuit recognized that because the owners utilized the Company's services, the Company was an "employer" under the statutory definition. However, the Court rejected the argument that because the Company was an "employer," the rent rolls of all nine buildings ought to be combined to satisfy the rent requirement.

> "While as an agent the Company is liable as an 'employer' to adhere to the strictures of the Act, nevertheless such vicarious responsibility does not require that the gross rentals of each of the Company's principals be pooled together merely because each principal has employed the Company as an agent." 444 F.2d at 613.

This Court granted certiorari to review the judgment of the Court of Appeals.

I.

THE THIRD CIRCUIT'S DECISION THAT THE WORKERS ARE IN THE EMPLOY OF THE OWNERS AND NOT THE COMPANY IS REQUIRED BY FLSA'S LANGUAGE AND PURPOSES.

A. *The Issue Whether the Workers Are "Employed in an Enterprise Engaged in Commerce" Is Properly Before This Court.*

For an employee to be covered by the FLSA's minimum wage and maximum hour provisions, Sections 6 and 7, he must either be (i) "engaged in commerce or in the production of goods for commerce," or (ii) "employed in an enterprise engaged in commerce or in the production of goods for commerce":

> "Sec. 6. (a) Every employer shall pay to each of his employees who in any workweek is *engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce,* wages at the following rates:
>
> * * *
>
> Sec. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is *engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce,* for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (Emphasis added).

Petitioner has contended that the workers are "employed in an enterprise engaged in commerce." (Pet. Br. pp. 9-12).

The term "enterprise engaged in commerce" is defined in pertinent part as follows:

> "'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
>
> (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) . . . , and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated); * * *." (Section 3(s))

For a concern to qualify as an "enterprise engaged in commerce," then, it must have employees who are involved in commerce and have done at least a minimum dollar amount of business per year.

The central question presented by this case is whether the workers are "employed" by the owners or the Company—that is, whether each owner's business or the Company's business is measured for the requisite minimum dollar amount and nexus with interstate commerce.

Petitioner makes the specious argument that the issue of by whom the workers are employed has been resolved by the Third Circuit's finding that the Company is an "employer" as defined in Section 3(d). (Pet. Br. p. 13). Section 3(d) provides in pertinent part as follows:

> "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ."

The Court found only that the Company was an "employer" within the meaning of Section 3(d) and so could be required to share any liability found under the Act. 444 F.2d at 611-12. The Third Circuit then went on to determine that the workers were in fact *employed* not by the Company but by the owners, and so that each of the owner's businesses, and not the Company's, was to be measured for qualification under the Act's minimum dollar requirements. 444 F.2d at 612-14.

While it may seem unusual to contend that an "employer" is not "employing" the workers in question, two different statutory provisions are being discussed, each with a different objective. Section 3(s) sets forth the minimum standards necessary for a business to be subject to Sections 6 and 7. Section 3(d) provides that for businesses that are in fact subject to Sections 6 and 7, the responsibility to comply with the Act can fall upon several different persons as "employers."*

As has often been recognized, it is one thing to determine whether a party comes within the Act's broad definition of "employer"; it is quite another to determine whose business to look to for determining whether the workers at issue are employed by an enterprise that satisfies the requirements of dollar amount of business done and nexus

* The Third Circuit's decision to remand the case to the District Court is not inconsistent with this view. If the District Court were to find a building's rent roll sufficiently large to make the Act applicable, the Company, as an agent of the owner of that building and so an "employer" within the meaning of Section 3(d), could be held responsible for the resultant liability.

with interstate commerce for the FLSA to apply. *See Hodgson* v. *Royal Crown Bottling Company, Inc.*, 324 F. Supp. 342, 346, 347 (N.D. Miss. 1970); *Shultz* v. *Isaac T. Cook Company*, 314 F. Supp. 461, 466-67 (E.D. Mo. 1970); *Mungovan* v. *Manierre*, 7 L.C. ¶61,646 (N.D. Ill. 1943). *See also Wirtz* v. *Lone Star Steel Company*, 405 F.2d 668, 669-70 (5th Cir. 1968); *Wirtz* v. *Country Club Acres, Inc.*, 58 L.C. ¶32,096 at 43,583-86 (N.D.N.Y. 1968).

B. *The History, Terms and Purposes of the FLSA Make It Clear That the Workers Are "Employed" by the Owners and Not the Company.*

The FLSA's definitions are not helpful in determining which of two independent businesses a worker is "employed" by and so which business is measured for qualification as an "enterprise engaged in commerce." "Employ" is defined to "include to suffer or permit to work" (§3(g)); "employee" is defined in pertinent part to "include any individual employed by an employer" (§3(e)); and "employer" in pertinent part to "include any person acting directly or indirectly in the interest of an employer in relation to an employee" (§3(d)). The courts have repeatedly held that these broad, vague statutory definitions do not serve as a meaningful guide to determine the existence or non-existence of an employment relationship. *E.g., Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 728-31 (1947); *Walling* v. *Portland Terminal Co.*, 155 F.2d 215, 217-20 (1st Cir. 1946), *aff'd*, 330 U.S. 148 (1947); *Walling* v. *Sanders*, 136 F.2d 78, 81 (6th Cir. 1943); *Helena Glendale Ferry Co.* v. *Walling*, 132 F.2d 616, 620 (8th Cir. 1942); *Bowman* v. *Pace Co.*, 119 F.2d 858, 860-61 (5th Cir. 1941). As this Court has stated in regard to these definitions, ". . . there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the

employer-employee relationship under the Act." *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 728 (1947).

When Congress has failed to "explicitly define" a term such as "employ," the question whether the workers at issue are employed by a particular business

> "... must be answered primarily from the history, terms and purposes of the legislation. The word ['employee'] 'is not treated by Congress as a word of art having a definite meaning. . . .' Rather 'it takes color from its surroundings . . . [in] the statute where it appears,' *United States* v. *American Trucking Assns.*, 310 U.S. 534, 545, and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.' *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259; *cf. New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552; *Drivers' Union* v. *Lake Valley Co.*, 311 U.S. 91." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 120, 124 (1944).

The significance of which business each worker is employed by, is that Petitioner rests its claim that the FLSA applies to these workers on its argument that they are all "employed in an enterprise engaged in commerce." To qualify as an "enterprise engaged in commerce" in any year, a business had to meet the minimum dollar requirement for that year.* The Company's business arguably

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* The minimum dollar requirement for qualification as a "business engaged in commerce" in any given year is:

1962–66	$1,000,000 in "annual gross volume of sales" (Fair Labor Standards Amendments of 1961, P.L. 87-30, §2(c), 75 Stat. 65)
February 1, 1967–January 31, 1969	$500,000 in "annual gross volume of sales made or business done" (FLSA §3(s))
February 1, 1969	$250,000 in "annual gross volume of sales made or business done" (FLSA §3(s))

met the minimum dollar qualification for every year since 1964; no owner's business was shown to qualify for any year. Thus, whether the Act applied to the workers turned on whether the dollar size of the Company's or each owner's business was considered. A review of the "history, terms and purposes" of the FLSA makes it abundantly clear that when Congress made it a prerequisite for the coverage of these workers that the business in which they are "employed" be an "enterprise engaged in commerce," it was talking about the business of each owner and not the Company's business.

The FLSA's dollar requirement appears on its face to be intended to protect small businesses. This interpretation receives overwhelming support from the Senate Report that accompanied the 1961 Amendment that first added "enterprise" coverage and the dollar requirement to the Act. Fair Labor Standards Amendments of 1961, P.L. 87-30, 75 Stat. 65. In an initial summary section, the Report clearly sets forth the purpose for the Act's requirement that a business have an "annual gross volume of sales" of at least $1,000,000 (presently $250,000) in order to qualify as an "enterprise engaged in commerce":

> "Finally, the million dollar test in the committee bill is not the constitutional standard for coverage. The constitutional standard for coverage is contained in these requirements which have just been discussed. The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law." S. Rep. No. 145, 87th Cong., 1st Sess., 5 (1961).

The remainder of the Report contains numerous additional statements indicating that the dollar limit was intended to protect small businesses. *Id.* at 25 (l. 12-15); 27 (l. 8-21); 31 (l. 15-23); 41 (l. 35-38). *See id.* at 77 (l. 29-44); 99 (l. 10-48) (minority views of Senators Barry Goldwater and Everett M. Dirksen). Significantly, a review of the Senate, House and Conference Reports that accompanied both the 1961 and the 1966 Amendments reveals nothing indicating that the protection of small business was not the purpose of the minimum dollar requirement. *See* Conf. Rep. No. 327, 87th Cong., 1st Sess. (1961); S. Rep. No. 145, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 75, 87th Cong., 1st Sess. (1961); Conf. Rep. No. 2004, 89th Cong., 2d Sess. (1966); S. Rep. No. 1487, 89th Cong., 2d Sess. (1966); H.R. Rep. No. 1336, 89th Cong., 2d Sess. (1966).*

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* The requirement that a business do at least a million dollars in sales to be an "enterprise engaged in commerce" was contained in a bill proposed by the Kennedy Administration. Then Secretary of Labor Arthur Goldberg spoke in support of the bill before a subcommittee of the House Education and Labor Committee. Hearings on H.R. 3935 Before the Special Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 1st Sess., 4 (1960). His remarks regarding the purpose of the proposed minimum dollar requirement for retail and service stores included the following statement:

> "We are covering, or proposing that we cover, large stores, large chainstores. We are proposing to cover—and we use the term 'an enterprise' for that purpose—an enterprise which has through its one or more constituent units, related units—in other words, if they are in the grocery business, grocery stores, markets—which have annual sales of more than a million dollars a year, and that has to be a pretty substantial store or enterprise. We are not talking about the small family store and I do not know why these small stores get involved in this and are concerned about this.
>
> And you may be interested in knowing how many establishments we are seeking to cover, how many enterprises we are seeking to cover. There are hundreds of thousands of small stores throughout the United States. We are only proposing

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Conclusive that the Congressional intent is en numerous
the above excerpt from the Senate Report is that z v. *First*
courts have quoted it for that purpose. *Wirtz*, 645 n. 17
National Bank and Trust Company, 365 F.2d 641; *Company*
(10th Cir. 1966); *Wirtz* v. *Savannah Bank & Trust*; *Shultz* v.
of Savannah, 362 F.2d 857, 862 (5th Cir. 1966); (W.D. Pa.
Arnheim and Neely, Inc., 324 F. Supp. 987, 993 (*Company*,
1969); *Wirtz* v. *Columbian Mutual Life Insurance*) F.2d 903,
246 F. Supp. 198, 203 (W.D. Tenn. 1965), *aff'd*, 380 se, quoted
909 (6th Cir. 1967). The Third Circuit, of cour 3.
this language in its opinion below. 444 F.2d at 61

Once it has been established that the purpose of f the mini-
mum dollar requirement is to avoid economic d dislocation
of small businesses, it becomes readily apparent what the
FLSA means by *"employed* in an enterprise e ngaged in
commerce." (emphasis added). An effect of exte nding the
FLSA's application to a group of employees is t o increase
the cost of the work they perform. In order for the Act's
dollar requirement and the exemption it affords s mall busi-
ness to be effective, a worker must be *"employed* d" by that
business which will suffer those increased costs.

If the FLSA were extended to cover the worker rs at issue
here, the increased cost would be borne solel y by the
owners. According to the Company's contract with each
building owner, the Company collects the rent, pays the
building's expenses, including its own fee and the payroll

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to cover in our retail and service coverage 15,000 enterprises. That is all. That shows you the magnitude of these enterprises, with 100,000 establishments. In other words, for a country as large as ours, we are dealing with a relatively small number of enterprises, 15,000 enterprises. And in the 15,000 enterprises there are 100,000 establishments doing this volume off business."

Id. at 23.

out of it, and gives the balance of the funds, if any, to the owner. (A. 21-24). Any profit or loss from the building's operation is solely the owner's. (A. 23). The Company's income will remain the same whether the Act is held applicable to these workers or not.

In sum, the Third Circuit was correct when it held that each building was a separate "enterprise" for the workers employed on those premises. The term "employed in an enterprise engaged in commerce," in Sections 6 and 7 must mean the building owner. Any other interpretation would make a sham of the Fair Labor Standards Act's clear purpose to protect America's small businesses.

II.

REVERSAL OF THE THIRD CIRCUIT WOULD HAVE AN ADVERSE IMPACT ON AN ALREADY DEPRESSED INDUSTRY.

When the FLSA was enacted in 1938, Congress did not exercise its full constitutional power to cover virtually all employers. While subsequent amendments extended the Act's coverage, Congress exercised caution to continue the exclusion for certain businesses. One such exclusion was for small businesses, defined in terms of annual gross volume of sales.* This protection is consistent with the special protection and exclusion from governmental regulation long recognized by Congress and governmental agencies. *See, e.g.*, Small Business Act, 15 U.S.C. §§631 *et seq.*; small business exemption to the Economic Stabilization Act of 1970, as amended, 6 C.F.R. §101.51.

The adoption of Petitioner's theory that the managing agent's business is the measuring entity for coverage would

* See footnote, p. 10, *supra*.

destroy the small business exemption for this industry. The economic burden of increased labor costs is borne directly and solely by the owner—the small businessman—not the managing agent. To group together all of these small, independent businessmen who individually would not be covered under the FLSA merely because they use a common service, the managing agent, would be to circumvent the Congressional intent to protect these businesses.

The Third Circuit recognized this and concluded that the business of each building owner must stand on its own for coverage under Sections 6 and 7 of the Act. It appropriately noted:

> "Since the economic criteria of the Act is based upon a legislative judgment that only businesses which have attained a substantial gross volume of sales should be covered because of their presumed economic capacity to pay a prescribed minimum wage, apparently *Congress feared that there might be undesirable economic consequences to small or inefficient businesses if they were brought within the scope of the Act.*
>
> "The Company here did not benefit, except as to its commission, as a result of the aggregate gross volume of rentals accruing from all nine buildings. Instead *it acted solely in an agency capacity on behalf of each of nine separate and distinct businesses.* . . . Any economic loss suffered in connection with a particular building is that of the owner. Similarly any profit enjoyed belongs to the individual building's owner. While as an agent the Company is liable as an 'employer' to adhere to the strictures of the Act, nevertheless *such vicarious responsibility does not require that the gross rentals of each of the Company's principals be pooled together merely because each principal has employed the Company as an agent.*" 444 F.2d at 613 (emphasis added).

Application of the FLSA to owners of buildings through the median of managing agents will result in the very dislocation Congress sought to prevent. Significant numbers of apartment buildings are only marginally profitable, or operate at a loss. As a result, the number of buildings abandoned has been steadily on the increase in major cities, creating a critical housing shortage. Kristof, *Economic Facets of New York City's Housing Problems* at 23 (1970).

New York City, like other large cities, is faced with an acute housing shortage that has the greatest impact on the poor and lower middle class. Studies indicate that one of the primary causes of this shortage is the consistent abandonment of buildings because of increased costs of maintenance and operation. The conclusion sought by Petitioner would increase costs that are absorbed solely by the small building owner and would, therefore, accelerate abandonments.

In New York City, the ever-increasing cost of maintenance and operation of apartment buildings has resulted in the abandonment of tens of thousands of housing units each year. In 1968, for example, approximately 7,100 buildings containing 57,000 units were officially recorded as abandoned. Rand Institute Report, *Rental Housing in New York City* at 6 (1970). In addition, tens of thousands of units have become dilapidated each year. According to one report prepared for the Institute for Public Administration, the number of dilapidated buildings increased by 37,000 in 1968 and those classified as deteriorating increased by 55,000. Kristof, *Economic Facets of New York City's Housing Problems* at 19 (1970). These statistics have accelerated in subsequent years.

The additional burden placed upon these marginal apartment buildings by adoption of Petitioner's tortured theory

can only serve to further exacerbate an already severe socio-economic problem. Congress obviously did not intend small, independent businesses like the apartment buildings at issue here to suffer the adverse economic impact of the Act's application.

CONCLUSION

For the forestated reasons, the decision of the Third Circuit should be affirmed and the complaint in all respects dismissed.

Respectfully submitted,

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